No. 75-1534

In the Supreme Court of the United States

OCTOBER TERM, 1975

UNITED STATES OF AMERICA, PETITIONER

v.

KENNETH LEE MORRISON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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CITATIONS

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The Solicitor General, on behalf of the United States of America, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra,* pp. 1a–2a) and its order denying rehearing (App. C, *infra,* p. 5a) are not reported. The order of the district court (App. D, *infra,* p. 7a) is not reported.

JURISDICTION

The judgment of the court of appeals (App. B, *infra,* p. 3a) was entered on November 6, 1975. The government's timely petition for rehearing and suggestion for rehearing *en banc* were denied on Febru-

ary 24, 1976 (App. C, *infra,* p. 5a). On March 16, 1976, Mr. Justice White extended the time for filing a petition for a writ of certiorari to and including April 24, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in a criminal case, the United States may appeal from a district court order granting a motion to suppress evidence, if the order is entered after the court—sitting as the trier of fact in a bench trial—has found the defendant guilty.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> * * * nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; * * *.

18 U.S.C. 3731 provides:

> In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.
>
> An appeal by the United States shall lie to a court of appeals from a decision or order of a district courts [*sic*] suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney certifies to the district court that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.
>
> The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.
>
> Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be released in accordance with chapter 207 of this title.
>
> The provisions of this section shall be liberally construed to effectuate its purposes.

STATEMENT

1. On September 27, 1972, a vehicle driven by respondent was stopped by Border Patrol agents at the permanent immigration traffic checkpoint near Truth or Consequences, New Mexico (Tr. 5–6).[1] While questioning respondent about his citizenship, Agent Copper detected the odor of marihuana coming from inside the car (Tr. 6, 11, 19, 23). The agent asked respondent to open the trunk of his car; when the trunk was opened, the agent again smelled marihuana (Tr. 6, 12, 18, 19). Respondent was directed to move his car to a secondary inspection area, where the agents found approximately 70 pounds of marihuana

[1] "Tr." refers to the transcript of respondent's bench trial on March 22, 1973.

hidden in a clothing bag in the trunk of the vehicle, under the back seat, and in the car's side panels (Tr. 6–7, 9, 14, 18–19, 23).

An indictment returned in the United States District Court for the District of New Mexico charged respondent with possessing marihuana with intent to distribute, in violation of 21 U.S.C. 841(a)(1). Respondent filed a pre-trial motion to suppress the marihuana found in his vehicle on the ground that the search of his car violated the Fourth Amendment. Respondent waived his right to a jury trial.

The motion to suppress was heard during the trial on the merits on March 22, 1973. At the close of the evidence, the district court denied the motion to suppress and found respondent guilty as charged (Tr. 22).[2]

2. On June 21, 1973, about three months after the trial in this case, this Court held, in *Almeida-Sanchez* v. *United States,* 413 U.S. 266, that a warrantless roving patrol search of a vehicle for aliens, conducted without probable cause at a point removed from the border and its functional equivalent, was unreasonable under the Fourth Amendment. The Tenth Circuit thereafter ruled, in *United States* v. *King,* 485 F. 2d 353, and *United States* v. *Maddox,* 485 F. 2d 361, that the principles of *Almeida-Sanchez* should be ap-

[2] The court decided to defer setting a date for sentencing until respondent's counsel, who was from out of state, had an opportunity to speak with a representative from the local probation office (Tr. 22–24). Because of subsequent developments, respondent was not sentenced and a formal judgment of conviction was not entered.

plied retroactively and that such principles encompassed searches conducted at fixed traffic checkpoints. The court of appeals remanded those cases to the district court for a determination, after an evidentiary hearing, whether the Border Patrol checkpoint near Truth or Consequences, New Mexico, is the functional equivalent of the border.

The present case (together with other cases then pending in the district court) was consolidated with *King* and *Maddox* before another judge for the evidentiary hearing on the functional equivalency issue. The district judge who presided over that hearing concluded that the Truth or Consequences checkpoint was not a functional equivalent of the border, and he referred the various consolidated cases back to their original judges for further proceedings. *United States* v. *King, et al.,* D. N. Mex., Crim. Nos. 24560, *et al.,* September 9, 1974.

The district judge in the present case thereupon reconsidered and granted respondent's earlier motion to suppress the marihuana found in his car (App. D, *infra,* p. 7a). The order stated that the court would "take appropriate action consistent with this Order if this Order is not appealed by the United States of America or if this Order is affirmed on appeal" (*ibid.*).

3. The United States appealed pursuant to 18 U.S.C. 3731. After this Court ruled in *Bowen* v. *United States,* 422 U.S. 916, that *Almeida-Sanchez* should not be applied retroactively to checkpoint searches conducted prior to June 21, 1973, the government in the

present case moved for summary reversal of the district court's suppression order.

The court of appeals, without reaching the merits of the appeal and without the benefit of briefs or oral argument, dismissed the government's appeal for lack of jurisdiction. The court held, relying on this Court's decision in *United States* v. *Jenkins,* 420 U.S. 358, that "the government has no right of appeal in this case," because "the defendant has been placed once in jeopardy and any further proceedings would necessarily involve the 'resolution of factual matters going to the elements of the offense charged'" (App. A, *infra,* p. 2a). "Under these circumstances," the court stated, "to subject the appellee to further proceedings would be to do substantial violence to the double jeopardy clause" (*ibid.*).

The court thereafter denied the government's petition for rehearing and suggestion for rehearing *en banc* (App. C, *infra,* p. 5a). The order denying rehearing stated: "In our view, the Supreme Court's decision in United States v. Jenkins, 420 U.S. 358, (1975) controls in this case and not United States v. Wilson, 420 U.S. 322 (1975) as suggested by the government" (*ibid.*).

REASONS FOR GRANTING THE WRIT

1. The decision below rests on a fundamental misapprehension of this Court's decisions in *United States* v. *Wilson,* 420 U.S. 332, and *United States* v. *Jenkins,* 420 U.S. 358. Those decisions establish that the United States may appeal from an adverse ruling by a trial judge made after the jury has returned a guilty verdict or (in a bench trial) after the judge has found the defendant guilty.

The Court held in *Wilson* that the government could appeal from a district court's order—entered after the jury had returned a guilty verdict—granting a motion to dismiss the indictment. "Correction of an error of law at that stage," the Court stated, "would not grant the prosecutor a new trial or subject the defendant to the harassment traditionally associated with multiple prosecutions" (420 U.S. at 352).

In *Jenkins,* the Court ruled that the government could *not* appeal from a post-trial order dismissing the indictment, because it was not clear that the district court, sitting as the trier of fact, had found the defendant guilty prior to dismissing the indictment. Consequently, "further proceedings of some sort, devoted to the resolution of factual issues going to the elements of the offense charged, would have been required upon reversal and remand" (420 U.S. at 370).

At the same time, the Court in *Jenkins* made clear that the result would have been different if the district court had unambiguously found the defendant guilty before dismissing the indictment. "[T]he Double Jeopardy Clause does not bar an appeal when errors of law may be corrected and the result of such correction will simply be a reinstatement of a jury's verdict of guilty or a judge's finding of guilt" (420 U.S. at 368).

Only "the uncertainty as to the basis for the District Court's action here" (*ibid.*) distinguished *Jenkins* from *Wilson*.

There is no such uncertainty in the present case. At the close of the evidence at respondent's trial, and more than 18 months before entering its suppression order, the district court explicitly found "beyond a reasonable doubt that the defendant is guilty as charged" (Tr. 22). Although respondent was not sentenced and a formal judgment of conviction was not entered, a correction of the district court's error at this stage would require no "further proceedings * * * devoted to the resolution of factual issues going to the elements of the offense charged" (*United States* v. *Jenkins, supra,* 420 U.S. at 370). Those issues were all resolved adversely to respondent when the district court, as trier of the facts, found him guilty as charged in the indictment.

All that would be required on remand here is the imposition of sentence and "the entry of a judgment" (*id.* at 365). Respondent would not be subjected to a second trial or "to the harassment traditionally associated with multiple prosecutions" (*United States* v. *Wilson, supra,* 420 U.S. at 352).

2. The court of appeals' error in dismissing the government's appeal in this case warrants correction by this Court. The decision here is not an isolated aberration but one of a series of Tenth Circuit decisions unjustifiably restricting the government's au-

thority to appeal from post-trial rulings.[3] This decisional pattern, developing so soon after this Court's decisions in *Wilson* and *Jenkins,* departs from the core principles established in those decisions and should be arrested promptly.

Moreover, since 18 U.S.C. 3731 authorizes the government to appeal from post-finding suppression orders in bench trials,[4] the court of appeals' holding in this case that the Double Jeopardy Clause precludes such appeals amounts to an implicit declaration that the pertinent portion of that statute is unconstitutional. That holding merits review by this Court.

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[3] We are filing petitions for writs of certiorari in two other cases nearly identical to this one (*United States* v. *Rose, United States* v. *Kopp*).

[4] Section 3731 provides that the United States may appeal from an order "suppressing or excluding evidence," so long as the order is "not made after the defendant has been put in jeopardy and before the verdict or finding * * *." Since the suppression order in the present case was entered *after* the district court found respondent guilty, the order is appealable under the terms of the statute.

The court of appeals' opinion misquoted the relevant language from Section 3731, mistakenly substituting "or" for "and" in the critical clause. The opinion thus stated: "Under § 3731, the government may appeal from an order of a district court suppressing or excluding evidence, provided that such order was '. . . not made after a defendant has been put in jeopardy *or* before the verdict or finding on the indictment or information . . .'" (App. A, *infra,* p. 2a; emphasis added).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1976.

APPENDIX A

United States Court of Appeals, Tenth Circuit

No. 74–1768

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KENNETH MORRISON, DEFENDANT-APPELLEE

[Filed November 6, 1975]

Appeal from the United States District Court for the District of New Mexico (D.C. No. 24882–CR)

Before: Hon. JOHN C. PICKETT, United States Senior Circuit Judge, and Hon. OLIVER SETH and Hon. ROBERT H. MCWILLIAMS, Circuit Judges.

Per Curiam

Appellee Morrison was found guilty of a violation of 21 U.S.C. 841(a)(1) following a trial to the court. However, a formal judgment of conviction was never entered. Instead, the district court reconsidered its earlier denial of defendant's motion to suppress certain evidence and, in the wake of the hearing required by our mandate in United States v. King, 485 F.2d 353 (10th Cir. 1973), granted the motion to suppress. The government now appeals that order under the provisions of 18 U.S.C. 3731. The validity of the searches by which the contraband was discovered was of critical importance in both *King* and this case. The facts of these cases were substantially similar and the resolution, adverse to the government, of the search

issue on remand in *King* was apparently deemed to be applicable in this case.

The government has moved to summarily reverse the district court's suppression order. However, before reaching the merits of any issues related to that motion, we are obligated to first consider the threshold question of this court's jurisdiction. As a general rule, the United States has no right of appeal in criminal cases, absent express statutory sanction. United States v. Hines, 419 F.2d 173 (10th Cir. 1969). Under § 3731, the government may appeal from an order of a district court suppressing or excluding evidence, provided that such order was ". . . not made after a defendant has been put in jeopardy or before the verdict or finding on the indictment or information . . .". Simply stated, § 3731 clearly and expressly precludes a government appeal "where the double jeopardy clause of the United States Constitution prohibits further prosecution.

Unquestionably, the defendant has been placed once in jeopardy and any further proceedings would necessarily involve the "resolution of factual matters going to the elements of the offense charged, . . .". *See,* United States v. Jenkins —— U.S. ——, 95 S.Ct. 1006 (1975). Under these circumstances, to subject the appellee to further proceedings would be to do substantial violence to the double jeopardy clause. We must therefore conclude that the government has no right of appeal in this case and that purported appeal must be dismissed for lack of jurisdiction. In view of the disposition of this case, the merits of the government's motion to summarily reverse need not be reached.

Appeal dismissed.

APPENDIX B

United States Court of Appeals for the Tenth Circuit

SEPTEMBER TERM—NOVEMBER 6, 1975

Before Hon. John C. Pickett, Senior Judge, Hon. Oliver Seth and Hon. Robert H. McWilliams, Circuit Judges.

No. 74–1768

[D.C. No. 24882–CR.]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KENNETH MORRISON, DEFENDANT-APPELLEE

Upon consideration of the record on appeal and the files of this court, it is ordered that the appeal is dismissed for lack of jurisdiction, pursuant to Rule 8 on the Court's own motion.

HOWARD K. PHILLIPS,
Clerk.

APPENDIX C

JANUARY TERM—FEBRUARY 24, 1976

Before Hon. David T. Lewis, Chief Judge, Hon. John C. Pickett, Senior Circuit Judge, Hon. Delmas C. Hill, Hon. Oliver Seth, Hon. William J. Holloway, Jr., Hon. Robert H. McWilliams, Hon. James E. Barrett and Hon. William E. Doyle, Circuit Judges.

No. 74–1768

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

KENNETH MORRISON, DEFENDANT-APPELLEE

This matter comes on for consideration of appellant's petition for rehearing and suggestion for rehearing en banc in the captioned case.

Upon consideration whereof, the petition for rehearing is denied by the circuit judges, Pickett, Seth, and McWilliams to whom the appeal was submitted. In our view, the Supreme Court's decision in United States v. Jenkins, 420 U.S. 358, (1975) controls in this case and not United States v. Wilson, 420 U.S. 322 (1975) as suggested by the government.

The petition for rehearing having been denied by the panel to whom the appeal was submitted and no member of the panel or judge in regular active service on the court having requested that the court be polled on rehearing en banc, the suggestion for rehearing en banc is denied. Rule 35, Federal Rules of Appellate Procedure.

HOWARD K. PHILLIPS,
Clerk.

APPENDIX D

In the District Court of the United States for the District of New Mexico

CRIMINAL No. 24,882

UNITED STATES OF AMERICA, PLAINTIFF

v.

KENNETH MORRISON, DEFENDANT

ORDER

The Court having reconsidered defendant's Motion to Suppress in light of *United States* v. *Maddox*, 485 F.2d 361 (10th Cir. 1973) and *United States* v. *King*, No. 24,560 (D. N. Mex., Sept. 9, 1974), it is hereby

ORDERED that the marihuana which is the subject matter of the charge herein shall be and is hereby suppressed.

The Court will take appropriate action consistent with this Order if this Order is not appealed by the United States of America or if this Order is affirmed on appeal.

H. VEARLE PAYNE,
U.S. District Judge.

Filed October 15, 1974.

U.S. GOVERNMENT PRINTING OFFICE: 1976